

There is No Such Thing As a Particular „Center and Eastern European Constitutionalism“

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Recently, after a new landslide electoral victory by Viktor Orban, who again managed to win a constitutional majority in the Hungarian parliament, a fresh perspective on constitutional developments in Central and Eastern Europe (CEE) has started taking shape. It could be described as constitutional appeasement.

Accordingly, the argument goes that given a widespread popular support for the constitutionally backsliding regimes in Hungary, Poland as well as elsewhere, we should – as good and open-minded people (and especially as social scientists) – start examining our own theoretical premises from which we have been observing and evaluating the developments in CEE. Perhaps, there is not everything wrong with CEE political and institutional developments? Perhaps, there are some good reasons for those trends? It could be, in some way which is from our constitutional perspective still not quite visible, that those trends are pointing in a better, even right direction and carry the promise of reforming our, admittedly, rather dated and worn-out constitutional conceptions and self-understanding. Why not learning something from the CEE constitutional developments? Let us engage into a dialogue, elevate ourselves beyond and above our constitutional epistemic and normative confines, accept ‘the other’ and build something new, a reformed European constitutionalism, by working closely together with the profoundly democratically legitimated constitutional and political actors in CEE. In short, the case for a special, distinct conception of Central and Eastern European Constitutionalism indeed could be persuasively made. Is that right?

The Case for CEE Constitutionalism

Let us first study what the content of the alleged CEE constitutionalism might consist of. In normative terms, the emphasis appears to be on collective values. A nation, conceived in ethnic terms, deserves a special constitutional protection. In contrast to liberal democracy, where an individual, irrespective of his or her many natural and social traits, is at the heart of the constitutional order, in illiberal democracy – recently rebranded as ‘Christian democracy’ by Orbán and others – individuals are principally parts of a collective whole, of a nation; and the individuals who ethnically belong to the nation can enjoy more rights as the individuals who do not. This constitutional approach privileges the idea of a common good, understood as the good of the many, over individual ambitions to pursue their own individual conceptions of the good. This paves the way to a more authoritative, more comprehensive and omnipresent use of political power that should be subject to fewer constraints as long as it is exercised efficiently and it (declaratorily) maximizes the common good of the many.

In institutional terms, this translates directly into a lesser need for a sophisticated system of checks and balances. The latter might simply present too many obstacles for an efficient

exercise of power. As the experience shows that especially the judiciary can pose many problems to the smooth implementation of the democratically legitimated legislative and the executive agenda, it is, apparently, appropriate to appoint more deferent and loyal judges, ideologically and politically close to a democratically elected government. For it is loyalty, and this does not go just for the judiciary, but it indeed applies across the range of (semi)-independent (quasi-)executive, (quasi-)judicial institutions, that is decisive for a good functioning of a democratically elected government. The fewer obstacles the government is subject to, the better for the wellbeing of the state and its people. Consent is privileged over dissent. Uniformity and loyalty is a guarantee for the former, diversity, freedom and autonomy lead to the latter. Hence, uniformity and loyalty ought to be strengthened by as deep as possible penetration of the political power in the civil society, by formally and informally, financially and morally awarding the loyal, and, in the same manner, deterring the non-loyal. This, for example, explains, indeed justifies, a special treatment of foreign funded and hence non-loyal NGOs in Hungary, and preferential approach to those civil society groups which are closer to the ruling political party in Poland.

Law and lawyers also play a very different role under CEE constitutionalism. By contrast to Western constitutionalism, where law has won some institutional autonomy from politics and power in general and follows, as well as imposes, certain constraints on power for its fair exercise, the conception of law in CEE countries dates back to the late 19th and early 20th century Europe. CEE countries are *Rechtsstaaten* in the primitive sense. They are, literally, states with the law, where law is conceived of and, in particular, applied as a mere instrument of (political) power. According to this ancillary conception of law, law can be used and abused for a whatsoever purpose and objective in the public, eg governmental interest. The interests of this rule by the law are achieved simply by conferring a legal form on an essentially arbitrary exercise of political power. Lawyers too are complicit in this process and have been ready and willing to bend and sacrifice their professional integrity, in the name of loyalty and in exchange for (in)formal rewards, to make this utterly politicized use of the law possible.

Finally, under CEE constitutionalism the governments are allowed, perhaps even obliged, to put their political authority in the service of a particular moral conception of a political community over which they rule. This has, for example, amounted to the protection of traditional values, family life and marriage, privileging a dominant religion in the society, to include the protection of national homogeneity, historical roots of the national identity and finally the very defence of the 'Christian Europe'. These are the real CEE values, which are simply different from the western, often decadent values that should no longer be imposed on the eastern part of Europe. This is why, eventually, those who have branded this approach to constitutionalism as moralizing, anti-pluralist and hence populist, have simply missed the point. In fact, moralization, anti-pluralism and defence of our people is the essence of CEE constitutionalism in the EU. These are the constitutive elements of the CEE constitutional identity. This identity works for the people and is supported by the people. It is anti-pluralist because it is interested in solutions and outcomes, in maximizing the common good of the people rather than being concerned with checks and balances. Finally, it is moralizing because in this de-moralized, ultimately uncertain times of globalization, under pressure of islamization and further diversification in the population, the people ask for moral guidance and the government simply needs to deliver.

A Critique

What, if anything, is wrong with this argument to recognize, even theoretically, a self-standing autonomous conception of CEE constitutionalism and make room for it inside the public law of the European Union?

The first problem is of a conceptual character. It begs a question, not unlike the one posed by Alice in the Wonderland, whether words can mean just whatever one wants them to mean. Is constitutionalism conceptually elastic enough to cover and embrace even the developments in CEE, to call it CEE constitutionalism? Or, are there, alternatively, certain conditions that any political practice has to meet to be described as constitutional?

Constitutionalism is a social and hence an interpretative concept. It has no essential meaning of its own. However, it does have a conventional meaning, which has evolved out of centuries of interpretative processes reflecting the discursive and political fights in the real world out there. This historical social construction of constitutionalism has put at its heart the individual. Accordingly, each and every individual is recognized an equal human dignity standing for the right of self-fulfilment or self-determination. The right to equal human dignity, in turn, dictates two further primordial individual rights: freedom and equality within the ambit of equal rights of others. These two rights entail that each individual should be free of arbitrary treatment. Any incursion in the freedom and equality of an individual, be it in vertical or horizontal relations, therefore requires a justification. This, namely non-arbitrariness, is, as Martin Krygier has taught us, what the rule of law stands for and what the rule of law is, simultaneously, there to guarantee.

On the other hand, democracy is understood as a vehicle of self-determination and as a means of ensuring freedom of each and every individual. Democracy is a political system in which its subjects are the authors of their own laws. It is a system of self-legislation that, out of recognition of equality, requires an equal opportunity for each individual to take part in a democratic process as inclusive as possible. This equal right to participate in the democratic process cannot be achieved without the rule of law, in an arbitrary environment; and, simultaneously, there can be no meaningful rule of law if the rules are not created in a democratic manner. This means that a modern conventional understanding of constitutionalism necessarily and intrinsically conjoins the rule of law and democracy in a holistic notion of constitutionalism. They condition and require all the essential constitutional rights and freedoms, such as freedom of conscience, freedom of speech, freedom of assembly, freedom of education and judicial protection; as well as institutional safeguards in form of checks and balances to ultimately ensure to each and every individual a fair and justified enjoyment of his or her equal freedom.

A political practice, such as that of some CEE countries, which departs from the described conventional meaning of modern constitutionalism in all of its constitutive elements, cannot be persuasively labelled as constitutional. Putting the individual in service of the collective violates the starting point of constitutionalism. Privileging the already dominant religion; closing down channels of communication; clamping down on NGOs and sanctioning non-compliant universities; undermining judicial independence and impartiality; totalizing power by gradually removing checks and balances etc. – none of that can be convincingly described as constitutionalism without doing violence to the conventional meaning of the

term or without committing a error of category. The political practices of the rogue CEE countries do not stand for a special version of constitutionalism. They are not its special eastern brand. By contrast, the practices in CEE are the constitutionalism's antipode; its denial. They amount to nothing more and nothing less than authoritarianism dressing up in the constitutional language.

If already the conceptual critique of CEE constitutionalism is found successful, then the story can basically end here. The very conceptual basis for describing the authoritarian practices as constitutional is lacking. However, even if the opposite was true and the practice of CEE states could be identified as a special type of regional constitutionalism, the advocates of this account would face a significant political problem. By joining the European Union, they have joined a club whose values are clearly identified and openly incompatible with those proposed by CEE constitutionalism. To claim 10 years later that CEE countries actually have their own values, on which a distinct model of constitutionalism is being constructed, is simply unpersuasive. This argument would not work in any golf club of an average quality, let alone in the European Union, which has been developed as a community of law. The only response such an argumentative move would deserve is: either share our values or leave.

Furthermore, it should be recognized in this context that the argument about the existence of unique CEE values *sensu lato* does not rest on any convincing historical grounds. To the contrary, CEE has been since the end of the WWII on a permanent road back to Europe. What was then understood as Western Europe was in fact a shared cultural space from which the CEE countries had been forcefully removed by the three totalitarian regimes of the 20th century. The re-assertion of CEE countries, their emancipation as it were, was motivated precisely, even exclusively, by the values that present the backbone of modern constitutionalism. These values were even much more appreciated in the East than in the West, simply because in the East they were much more and much longer violated and trampled upon. To argue, following 2010, that the time has come to put the Western liberal imperialism to an end, amounts to committing a historical error, for bashing something that has actually never existed. To fight liberal imperialism of the West means defying the very values in the name of which and for whose realization the CEE countries have emerged out of the ashes of communism.

In short, history belies the existence of CEE autonomous political, constitutional values, which would be qualitatively at odds with the constitutional values of Western Europe. While of course, these values can be also interpreted and applied differently in different contexts, behind the fundamental boundaries of different polities that EU member states stand for, deep down these different polities all share the basic pre-political foundations of what it takes to create a community of equals, in which the conditions are laid for an inclusive, pluralist, and above all, fair political play between the divergent worldviews and the many competing conceptions of the good.

Next, it is argued, that those who are making the claims in favour of CEE constitutionalism fail to make a normatively convincing case for it. Their pursuit of illiberal democracy as a flagship project of CEE constitutionalism is full of performative contradictions. We are, for example, witnessing politicians defending 'Christian Europe' in the utmost non-Christian way. The most vocal proponents of traditional values, family and marriage, show little sign

of affording these values a meaningful place in their actual lives. Furthermore, normatively the case has not been made why, say, Christianity, family and marriage, as well as a particular conception of national constitutional identity, could not be defended and even promoted in the 'Western' model of constitutionalism. Has it not been precisely constitutionalism, and only constitutionalism, that has made these value-commitments viable and continues to make them possible in practice? Of course, not as part of a political, public power fiat, but as a matter of personal, individual choice within the ambit of respect for equal rights of others. There is nothing in 'Western constitutionalism' that prevents the individuals and communities from staying faithful to the traditional values. Indeed, that is one of their constitutional rights, which, however, cannot and should not be imposed on those other individuals and communities who would like to use the very same rights to make different value choices.

Finally, how to respond to the purportedly democratic argument, according to which CEE constitutionalism indeed does exist and should be recognized as such for it has repeatedly won popular legitimation in more than one state? Like in the case of constitutionalism, democracy comes with certain conventional content and meaning too. Admittedly, democracy has been one of the most abused social concepts. Not infrequently, the most undemocratic countries boast with democracy in their names. However, it is clear that shall democracy retain any positive and coherent normative meaning, its conception of the people in whose name and for whom all the powers are exercised must proceed from the assumption that the people are composed of and constitute a community of equals, who deserve and are entitled to equal respect. Building a democracy where a strict dividing line is drawn between us and them; between our people and the others; and whereby in name of our people the power is totalized and those who are different are excluded from it, obviously runs affront the idea(l) of community of equals. Hence, such a democracy is not a democracy in the conventional sense, but a more or less haphazard, arbitrary political system in which the argument of power reigns over the power of arguments.

In CEE countries, where the nominal system of democracy has been so much institutionally and substantively, formally and informally, tampered by a single (formal or informal) ruling political power in favour of its political, economic and civil society clique, a real democracy no longer exists, and what is described as free and fair election is, in reality, just a semblance of it. In short, the more successful and far-reaching constitutional capture of the state, the greater the likelihood for its overwhelming 'democratic' support. The examples of the German Democratic Republic, the People's Republic of China and the Democratic People's Republic of Korea attest to that point and there are few, if any, who would be willing to describe these countries as democratic in the best conventional meaning of the term.

Conclusion

By way of conclusion, no plausible, let alone theoretically convincing case can be made in favour of existence of a special CEE constitutionalism inside the EU legal common whole. There are strong conceptual, political, normative, historical and democratic reasons which prove that branding the existing CEE political practices as constitutional in their own, distinct way, separate from 'Western constitutionalism', is deeply flawed. The events in

CEE post-2010 are not an example of new constitutionalism, but stand for a revival of authoritarianism, which is incompatible not only with the fundamental values of the European Union, but even with the minimal common value denominator of the more encompassing Council of Europe. There should be no room for such political developments inside the EU and, especially, constitutional theory should not be making room for it.

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